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3
4 UNITED STATES DISTRICT COURT
5 WESTERN DISTRICT OF WASHINGTON
6 AT TACOMA

7 MICHAEL FLEMATE,

8 Plaintiff,

9 v.

10 PAT GLEBE, JOE WILLIAMSON and
11 CAROLINE KLATT,

12 Defendants.

No. C11-5426 BHS/KLS

REPORT AND RECOMMENDATION
Noted For: December 23, 2011

13 Plaintiff Michael Flemate filed this civil rights action against Defendants Pat Glebe, Joe
14 Williamson and Caroline Klatt alleging that Defendants denied him a position of employment in
15 the prison kitchen because of his disability in violation of the Americans With Disabilities Act
16 (ADA), 42 U.S.C. §§ 12131–12165. Defendants filed an answer (ECF No. 11) and the Court
17 issued a Pretrial Scheduling Order (ECF No. 12). On August 24, 2011, the mail containing the
18 Pretrial Scheduling Order sent to Plaintiff was returned to the court as “undeliverable” and
19 marked “Deceased”. ECF No. 13. On August 26, 2011, Defendants filed a Statement of Death
20 Pursuant to Rule 25 of the Federal Rules of Civil Procedure. ECF No. 14. Defendants also sent
21 a copy of the Statement of Death to Plaintiff’s sister, who is listed by the Department of
22 Corrections as Plaintiff’s emergency contact. *Id.*

23
24 **DISCUSSION**

25 Federal Rule of Civil Procedure 25(a)(1) provides:

26 If a party dies and the claim is not extinguished, the court may order substitution
of the proper party. A motion for substitution may be made by any party or by the

1 decedent's successor or representative. If the motion is not made within 90 days
2 after service of a statement noting the death, the action by or against the decedent
must be dismissed.

3 Fed.R.Civ.P. 25(a)(1).

4 A statement noting the death must be served on parties in accordance with the
5 requirements of Rule 5. Fed. R. Civ. P. 25(a)(3). Federal courts, including the Ninth Circuit,
6 have strictly construed the service and filing requirements of Rule 25. In *Barlow v. Ground*, 39
7 F.3d 231, 233 (9th Cir.1994), the Ninth Circuit held that Rule 25 required two affirmative steps
8 to trigger the running of the ninety-day period. "First, a party must formally suggest the death of
9 the party upon the record. Second, the suggesting party must serve other parties and nonparty
10 successors of the deceased with the suggestion of death" *Id.*¹

12 The Department of Corrections received word that Mr. Flemate passed away on August
13 23, 2011. ECF No. 14. The Court received notice of this when its Scheduling Order was
14 returned by the Department as undeliverable and marked "deceased." ECF No. 13. On August
15 26, 2011, Defendants electronically filed a Statement of Death pursuant to Rule 25 and mailed a
16 copy of the Statement of Death to Mr. Flemate's sister, who he listed as his emergency contact.
17 *Id.* It is unknown if Mr. Flemate's estate has a personal representative.

19 The ninety-day time period of Rule 25 was triggered when Defendants filed the
20 Statement of Death on August 26, 2011. The ninety-day time period of Rule 25 has elapsed and
21 no motion for substitution has been filed on behalf of Plaintiff.

23 CONCLUSION

24 The Court should dismiss this action with prejudice pursuant to Rule 25.

26 ¹ In *Barlow*, the Ninth Circuit considered the version of Rule 25 that was in effect in 1994. The 2007 version does not differ in substance.

1 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil
2 Procedure, the parties shall have fourteen (14) days from service of this Report and
3 Recommendation to file written objections. See also Fed. R.Civ.P. 6. Failure to file objections
4 will result in a waiver of those objections for purposes of appeal. *Thomas v. Arn*, 474 U.S. 140
5 (1985). Accommodating the time limit imposed by Rule 72(b), the Clerk is directed to set the
6 matter for consideration on **December 23, 2011**, as noted in the caption. The Clerk is also
7 directed to send a copy of this Report and Recommendation to Plaintiff's sister, who is listed by
8 the Department of Corrections as Plaintiff's emergency contact, at 7128 Church Street,
9 Apartment A, Gilroy, California 95020.

11
12 **DATED** this 6th day of December, 2011.

14 
15 Karen L. Strombom
16 United States Magistrate Judge